DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Cambridge Electric Light Company and Commonwealth Electric Company for Approvals Relating to the Termination of Power Purchase Agreements with Pittsfield Generating Company, L.P.

D.T.E. 04-60

REPLY TO THE MOTION OF THE ATTORNEY GENERAL TO STRIKE PORTIONS OF THE INITIAL BRIEF OF PITTSFIELD GENERATING COMPANY, L.P.

On August 17, 2004, the Attorney General submitted a Motion to the Department of Telecommunications and Energy ("DTE" or "Department") to strike portions of the Initial Brief of Pittsfield Generating Company, L.P. ("Pittsfield"). On August 18, 2004, the Hearing Officer granted Pittsfield's request to respond to the Motion to Strike such response to be filed with the Department on August 20, 2004. In accordance with the Hearing Officer's August 18, 2004 ruling, Pittsfield submits the following reply to the Attorney General's Motion to Strike. As described further below, the Attorney General introduced the issue of contract interpretation into this proceeding and his attempt to exclude opposing legal arguments should be rejected.

ARGUMENT

A. IF THE HEARING OFFICER RULED THAT ISSUES OF CONTRACT INTERPRETATION ARE OUTSIDE THE SCOPE OF THIS PROCEEDING, ALL BRIEFING RELATING THERETO SHOULD BE STRUCK

In his Motion to Strike, the Attorney General asserts that Pittsfield's Initial Brief "includes numerous arguments regarding issues that the Hearing Officer specifically excluded from consideration during this proceeding." *See* AG Motion at 1. In support of this statement,

the Attorney General cites the following statement made by the Hearing Officer during the adjudicatory hearing:

The question of whether or not Altresco's current operation of the system, at the capacity factor at which you're currently operating the system, and the question of whether or not that's a breach, that's a legal question and that's not one we're going to determine here. In addition, the witnesses are not qualified to interpret the contract here. So I would not allow questions that interpret the contract, because they are not lawyers.

AG Motion at 1 *citing* Tr. 194. The Attorney General asserts that this statement by the Hearing Officer constituted a ruling which "limited the scope of these proceedings."

As addressed further below, in Pittsfield's view, in making the above statement, the Hearing Officer did not limit the scope of this proceeding, but rather set forth the accepted legal tenants that (1) contract interpretation is a matter of law; and (2) fact witnesses cannot testify as to matters of law. Thus, Pittsfield interpreted the Hearing Officer's statement as a proper exclusion of lay witness testimony purporting to opine on and interpret the 1992 PPAs. Pittsfield interpreted the Hearing Officer's statement to mean that legal arguments regarding the proper interpretation of the 1992 PPAs were to be addressed on brief.

If the Hearing Officer intended to exclude from the scope of this proceeding all issues relating to interpretation of the 1992 PPAs (and specifically whether Pittsfield's current operation of the Facility at its current capacity factor complies with the provisions of the 1992 PPAs), applying the Attorney General's own rationale, most of the Attorney General's Initial Brief and Reply Brief would fall outside the scope of this proceeding and must be struck since

the Attorney General's Initial and Reply Briefs focus almost exclusively on interpreting the 1992 PPAs.¹

For instance, in his Initial Brief, Section A, the Attorney General asserts that "the Company failed to exercise its full contractual rights to settle disputed matters involving the Pittsfield PPAs and pursue its rights under the terms of the PPAs." AG Initial Brief at 5. In support of this statement, the Attorney General proceeds to provide his interpretation of the 1992 PPAs. See AG Initial Brief at 5 ("Under the terms of the Pittsfield contract"); Id. at 7 ("The terms of the contract specify"); Id. ("The PPAs contain no provision"); Id. at 7 n.6 ("Several other sections of the contract support"); AG Reply Brief at 5 ("A more reasonable explanation for the terms of the existing contracts"); Id. ("the existing contracts provide for"); Id. ("Several other sections of the contract support"); Id. at n.6 ("Under [1992 PPAs] Article 17"); Id. at n.7 (1992 PPAs "Article 17.4 provides")

In addition to providing his legal interpretation of certain contractual provisions, the Attorney General asserts that Pittsfield and the Companies had a contractual dispute regarding the dispatch of the Facility and the Companies' failure to pursue and evaluate that dispute,

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¹ Indeed, Pittsfield filed its brief in response to the Attorney General's questioning during the adjudicatory hearing which implied that the current dispatch of the Facility did not comply with the provisions of the 1992 PPAs and that the Companies should have challenged this practice. Thus, the only reason that contract interpretation with respect to the Facility's capacity factor is at issue in this case at all, is because the Attorney General raised it.

constitutes a failure to mitigate. AG Reply Brief at 4²; see also AG Initial Brief at 7-10. However, to support this argument, the Attorney General engages in contractual interpretation. See AG Initial Brief at 7 (under the 1992 PPAs, the Companies "can dispatch the plant" and "so could have taken action to protect [their] customers from financial impact from Pittsfield's reduced output."); Id. (Under the terms of the contract, the Companies could have required that Pittsfield dispatch the plant at the more economic higher output levels it had experienced prior to September 2003); Id. (the Companies did not issue a notice of default or demand notice under the 1992 PPAs); Id. at 8 (the Companies did not evaluate options to terminate the 1992 PPAs); Id. (The Companies "did not explore" terminating the PPAs for nonperformance); Id. (The Companies may have been able to "terminate the PPAs outright based on Pittsfield's nonperformance"); Id. at 9 ("The dispute could have affected the value of the PPAs "); AG Reply Brief at 4 n.5 (The Companies could have called for arbitration under 1992 PPAs Article 12). In making each of these assertions, the Attorney General engages in contract interpretation, which, under the Attorney General's view of the Hearing Officer's ruling, must be struck.

In sum, if the Hearing Officer excluded issues related to contract interpretation of the 1992 PPAs, the following pages of the Attorney General's briefs must be struck: AG Initial Brief Sections A and B, pp. 4-10; AG Reply Brief pp. 4-6.

AG Reply Brief at 4.

² In his Reply Brief, the Attorney General characterizes his contract argument as:

simply argu[ing] that the Companies failed to prove that the termination agreements represent the maximum mitigation required by the Restructuring Act. The basis for this argument is the fact that there is an outstanding credible contract dispute that the Companies failed to evaluate and pursue further, to the detriment of its customers.

B. THE HEARING OFFICER APPROPRIATELY RULED THAT FACT WITNESSES COULD NOT OFFER LEGAL OPINION REGARDING THE INTERPRETATION OF THE PPAS

As noted above, in Pittsfield's view, the Hearing Officer did not intend to exclude from the scope of this proceeding issues related to interpretation of the 1992 PPAs or to prohibit the parties from making legal arguments related thereto in their briefs. A review of the circumstances leading up to the Hearing Officer's comments supports this view.

The Hearing Officer made her comments after a discussion between attorneys involving an Attorney General request to go into closed session so that the Attorney General could question Company witnesses about internal Company documents which discussed the contract dispute between the Companies and Pittsfield. During that discussion, Pittsfield Attorney John DeTore argued that Pittsfield should not be excluded from the hearing room during such testimony, stating:

It's pretty clear from today that the thrust of the Attorney General's argument is they're proffering some interpretations of the contract that I assume they will argue that either, A, Pittsfield should dispatch, or bid the plant a different way so as to achieve a higher capacity factor, or even going to the extreme of saying they've somehow breached the contract and the contract should be terminated.

Now, we'll certainly have an opportunity on brief to address all of those legal issues, and we intend to do so.

However, in order to respond to the Attorney General's arguments, we need to know what evidence the Attorney General is relying on to make those arguments. It seems pretty clear to me that at least some of the evidence they're going to rely on to make those arguments is the evidence that's in these documents and will be potentially elicited from these witnesses during this closed session.

So, if we're not allowed to see a major portion of the Attorney General's case, we're really prejudiced in being able to respond.

. . .

Moreover, there's some possibility, depending upon what the company witnesses say about the contracts, that I may want an opportunity to cross-examine them

Tr. 190-191.

After reviewing the relevant documents and hearing from the Attorney General as to the nature of the questioning, the Hearing Officer stated:

The question of whether or not Altresco's current operation of the system, at the capacity factor at which you're currently operating the system, and the question of whether or not that's a breach, that's a legal question and that's not one we're going to determine here. In addition, the witnesses are not qualified to interpret the contract here. So I would not allow questions that interpret the contract, because they are not lawyers.

That given, the two points that Pittsfield brought up needing to protect itself are not going to happen behind closed doors; and therefore, we'll go into a closed session without Pittsfield present.

Tr. at 194-95.

In its Motion to Strike, the Attorney General fails to quote the last paragraph of the Hearing Officer's statement. It is this paragraph, however, which clearly demonstrates that the Hearing Officer's intent in making the statement was not to limit the scope of the proceeding, but to respond to Pittsfield's argument that it would be prejudiced if it was excluded during the questioning of the Company witnesses in closed session. The Hearing Officer was making clear that Pittsfield would suffer no prejudice if it was excluded from the closed door session because the witnesses would not be providing testimony regarding contract interpretation.

Indeed, the Hearing Officer's statement that Pittsfield would suffer no prejudice because the witnesses during closed session would not be permitted to testify regarding their interpretation of the 1992 PPAs, is consistent with two long standing legal precedents. First, contract

interpretation is a matter of law.³ Second, lay witnesses cannot testify as to matters of law.⁴ Thus, the Hearing Officer excluded lay witness testimony regarding the proper interpretation of the 1992 PPAs because such evidence is inadmissible. She did not rule, however, that issues relating to contract interpretation are irrelevant in this proceeding.

The parties similarly did not object to witness testimony regarding the proper interpretation of the contract based on relevancy grounds, but on the grounds that fact witnesses, who are not lawyers, are not competent to testify regarding legal issues such as contract interpretation. For instance, in objecting to a line of questioning by the Attorney General into the meaning of the 1992 PPAs, the attorney for the Companies stated:

³ See e.g., S.D. Shaw & Sons, Inc. v. Joseph Rugo, Inc., 343 Mass. 635, 639 (1962) (testimony regarding interpretation of construction contract called for an opinion as to a matter of law and was properly excluded); Lawrence-Lynch Corp. v. Dept of Environmental Management, 392 Mass. 681, 682 (1984) (an interpretation of an unambiguous contract is a matter of law); Cody v. Connecticut Gen. Life Ins. Co., 387 Mass. 142, 146 (1982) (summary judgment is appropriate when the issue presented is one of contract interpretation because it raises only a question of law); Massachusetts Bay Transp. Auth v. Allianz Ins. Corp., 413 Mass. 473, 476 (1992) (same).

⁴ Commonwealth v. Brady, 370 Mass. 630 (1976) (no error in excluding question to insurance agent witness interpreting insurance coverage, as it involved conclusion of law); Perry v. Medeiros, 369 Mass. 836, 842 (1976) (witness properly precluded from giving opinion interpreting building code); Cheschi v. Boston Edison, 39 Mass. App.Ct. 133, 138 n.7 (1995) (judge correctly sustained objections to questioning of witness on interpretation of regulations); First National Bank of Boston v. Moilanen, 1995 WL 1146871 (1995) (J. Toomey) ("Statements from lay persons that provide an opinion as to a matter of law are inadmissible"); Hon. Paul J. Liacos, Handbook of Massachusetts Evidence, (Brodin and Avery, Seventh Ed.) §7.1 ("lay . . . witnesses are precluded from giving an opinion that involves a conclusion of law or in regard to a mixed question of fact and law."); Fiber Technologies Network, LLC, D.T.E. 01-70, (2002) at 37 n. 29 ("to the extent a fact witness asserts positions of law, the witness' conclusory legal statements are accorded little, if any evidentiary weight. Such statements are considered to be argument by counsel").

to the extent we're getting into interpretations of the contract and those kinds of legal issues, I would suggest that those could be dealt with on brief rather than asking about potential discussions in e-mails by people who may not be attorneys.⁵

Tr. 37

There was no objection by the Attorney General to this statement and the Hearing Officer did not contradict it or issue any contradictory rulings.

C. BY EXCLUDING WITNESSES FROM TESTIFYING ABOUT LEGAL ISSUES, THE HEARING OFFICER DID NOT RULE THAT ISSUES OF CONTRACT INTERPRETATION WERE IRRELEVANT IN THIS PROCEEDING. RATHER, SUCH LEGAL ISSUES ARE APPROPRIATELY ADDRESSED IN THE PARTIES' BRIEFS

The Attorney General seems to imply that in precluding the Companies' witnesses from testifying about legal issues of contract interpretation, the Hearing Officer thereby ruled that issues of contract interpretation are outside the scope of this proceeding. However, it does not follow that because a fact witness cannot testify about legal issues, such issues are irrelevant and outside the scope of a proceeding. Instead, the Hearing Officer's ruling follows standard evidentiary procedure that fact witnesses testify about facts and legal issues are decided by the decisionmaker (a judge or here, the DTE) with the assistance of argument by counsel in briefs.

Indeed, both Pittsfield's and the Companies' attorneys made clear on the record that it was their understanding that legal issues of contract interpretation would be addressed in the parties' briefs. *See* DeTore, Tr. at 194 ("Now, we'll certainly have an opportunity on brief to

⁵ In another instance, the attorney for the Companies objected to a line of questioning regarding the terms of the 1992 PPAs on NEPOOL dispatch, stating "I'm going to object to that. We're getting into interpretations I think the witness has answered to the best of his ability, but these are legal questions regarding NEPOOL and ISO New England organizations and the interpretation of this contract under the new structure." The Hearing Officer then proceeded to allow the witness to answer a question as to what the contract said, but not to interpret it. Tr. 46-48. See also Companies' objections at Tr. 38, 169 and 170-171 and Pittsfield's objection at 180.

address all of those legal issues, and we intend to do so"); Werlin Tr. at 37 ("to the extent we are getting into interpretations of the contract and those kind of legal issues, I would suggest that those could be dealt with on brief"). The Attorney General did not object to these statements nor did the Hearing Officer make any ruling to the contrary because it is beyond question that issues such as the proper interpretation of a contract is precisely the type of legal arguments that are to be addressed in briefs by counsel. *See e.g.*, *Berkshire Power Development*, *Inc.*, D.P.U. 96-104 (1997) at 10 (noting hearing officer ruling that legal arguments regarding status of a company as a "public service corporation" was an inappropriate topic for discovery and was appropriate only in motions, memoranda and briefs).

The Attorney General takes issue with the fact that Pittsfield does not cite to the transcript in making legal arguments in its brief. The transcript is of the evidentiary record where witnesses testified about facts. The arguments in Pittsfield's brief relate to contract interpretation that is a matter of law and since such arguments do not rely on any factual evidence other than the words of the contracts themselves, only the contracts need be cited.

D. THE ABSENCE OF CROSS-EXAMINATION ON THE LEGAL ISSUE OF CONTRACT INTERPRETATION DOES NOT PREJUDICE THE ATTORNEY GENERAL

The Attorney General asserts that for Pittsfield to address legal issues of contract interpretation in its brief is "extremely prejudicial" to the Attorney General because the Attorney General could not explore such issues during cross-examination. AG Motion at 1. However, as noted above, the fact witnesses proffered by the Companies could not offer testimony relating to the interpretation of the 1992 PPAs, a legal issue. Thus, any testimony that may have been elicited from such witnesses on cross-examination would not assist the Department's

interpretation of the contract. *Boston Edison Company*, D.P.U./D.T.E. 97-95 (2001) at 26 (noting that in a prior proceeding the Department in no way relied on lay witness' testimony elicited on cross-examination which constituted a legal conclusion).

Rather, the parties should, and did, offer their legal arguments relating to contract interpretation in their briefs. Both Pittsfield and the Attorney General have offered for the DTE's consideration their differing legal positions as to the proper interpretation of the 1992 PPAs. Both parties are in the exact same position and both have had a fair chance to brief the issues. In fact, Pittsfield specifically set forth its entire legal position in its Initial Brief to provide the Attorney General with the opportunity to respond in his Reply Brief. Moreover, the Attorney General stands in no different a position than Pittsfield and the Companies -- no party was allowed to cross-examine fact witnesses regarding contract interpretation.

E. PITTSFIELD'S REFERENCE TO THE NEPOOL AGREEMENT IS APPROPRIATE

The Attorney General objects to the reference in Pittsfield's brief to the NEPOOL Agreement, however, has been incorporated in numerous statutory and regulatory provisions of the Department. See e.g., G.L. c. 164A, §1 (defining NEPOOL Agreement) and §2 (authorizing the NEPOOL Agreement); 220 CMR 11.02 (definition of "Unit Contract" defined as in the NEPOOL Agreement); Model Terms and Conditions for Competitive Suppliers, D.P.U./D.T.E., 97-65, Attach. II (definition of "own load calculation" incorporating NEPOOL Agreement). As with other statutes and regulations, neither the parties nor the Department need to introduce them into evidence in order to reference them in a brief or order. Indeed, the Department itself has cited and relied on the NEPOOL Agreement as authority without record citations. See Taunton

Municipal Light Plant, D.P.U. 91-273, (Phase II) at 9 n.6 (1995); Braintree Electric Light Department, D.P.U. 93-196 (Phase II) at 5, n.6 (1995). In any event, the DTE may take official notice of the NEPOOL Agreement. See 220 CMR 1.10(2).

For the above reasons, the Department should deny the Attorney General's Motion to Strike Portions of Pittsfield's Initial Brief.

Respectfully submitted,

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⁶ The Attorney General also objects to Pittsfield's citation to an attachment submitted to the Department with the 1992 PPAs when seeking approval therefore. This attachment was provided to the Department to show the Department the differences between the 1992 PPAs and the Standard Form Agreement. It is Pittsfield's view that because the referenced attachment was included in a filing with the DTE, the Department may incorporate it by reference in this proceeding. *See* 220 CMR 1.10(3). However, to avoid any confusion regarding the record, Pittsfield agrees to withdraw its briefing statements regarding this attachment.